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No. 83-276

In the Supreme Court of the United States

OCTOBER TERM, 1983

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

v.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL.

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

v.

BRADLEY BOE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

1. Whether Section 1113 of the Department of Defense Authorization Act of 1983—which states that those who fail to register as required by the Military Selective Service Act shall be ineligible for assistance under Title IV of the Higher Education Act of 1965—is a bill of attainder.

2. Whether Section 1113—which also states that those who wish to receive Title IV assistance and who are required to register must file a statement of registration compliance with their colleges—compels such persons to incriminate themselves in violation of the Fifth Amendment.

PARTIES TO THE PROCEEDING

In addition to the Selective Service System, appellants in both cases include Major Thomas K. Turnage, the United States Department of Education, and Terrel H. Bell.

In addition to the Minnesota Public Interest Research Group, the appellees in the first captioned case are individuals using the pseudonyms John Doe, Richard Roe, and Paul Poe.

In addition to the individual using the pseudonym Bradley Boe, the appellees in the second captioned case are individuals using the pseudonyms Carl Coe and Frank Foe.

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BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the district court upon issuance of the preliminary injunction (J.S. App. 1a-30a) is reported at 557 F. Supp. 937. The opinion accompanying the permanent injunction (J.S. App. 31a-37a) is not reported.

JURISDICTION

The jurisdiction of the district court was based on 28 U.S.C. (Supp. V) 1331. The judgments of the district court (J.S. App. 38a-41a) were entered on June 16, 1983. Notices of appeal (J.S. App. 42a-45a) were filed on June 21, 1983, and June 27, 1983. The jurisdictional statement was filed on August 19, 1983. Probable jurisdiction was noted on December 5, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article 1, Section 9, Clause 3 of the Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

The Fifth Amendment to the Constitution provides:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

2. Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 718, 748, provides:

> (a) Section 12 of the Military Selective Service Act (50 U.S.C. App. 462) is amended by adding after subsection (e) the following new subsection:
>
> "(f)(1) Any person who is required under section 3 to present himself for and submit to registration under such section and fails to do so in accordance with any proclamation issued under such section, or in accordance with any rule or regulation issued under such section, shall be ineligible for any form of assistance or

benefit provided under title IV of the Higher Education Act of 1965.

"(2) In order to receive any grant, loan, or work assistance under title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.), a person who is required under section 3 to present himself for and submit to registration under such section shall file with the institution of higher education which the person intends to attend, or is attending, a statement of compliance with section 3 and regulations issued thereunder.

"(3) The Secretary of Education, in agreement with the Director, shall prescribe methods for verifying such statements of compliance filed pursuant to paragraph (2). Such methods may include requiring institutions of higher education to provide a list to the Secretary of Education or the Director of persons who have submitted such statements of compliance.

"(4) The Secretary of Education, in consultation with the Director, shall issue regulations to implement the requirements of this subsection. Such regulations shall provide that any person to whom the Secretary of Education proposes to deny assistance or benefits under title IV for failure to meet the registration requirements of section 3 and regulations issued thereunder shall be given notice of the proposed denial and shall have a suitable period (of not less than thirty days) after such notice to provide the Secretary with information and materials establishing that he has complied with the registration requirement under section 3. Such regulations shall also provide that the Secretary may afford such person an opportunity for a hearing to establish his compliance or for any other purpose."

(b) The amendment made by subsection (a) shall apply to loans, grants, or work assistance

under title IV of the Higher Education Act for periods of instruction beginning after June 30, 1983.

STATEMENT

1. Section 3 of the Military Selective Service Act, 50 U.S.C. App. (Supp. V) 453, empowers the President, by proclamation, to require the registration of every male citizen and male resident alien between the ages of 18 and 26. Its purpose is to facilitate any conscription that may eventually be necessary. See 50 U.S.C. App. 454. Section 12 of the Act, 50 U.S.C. App. (& Supp. V) 462, imposes criminal penalties for violations of the Act, including failure to register. Although draft registration was discontinued in 1975, it was reactivated by President Carter on July 2, 1980. Proclamation No. 4771, 45 Fed. Reg. 45247 (1980).

On September 8, 1982, Congress enacted and the President signed the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 718 *et seq.* Section 1113 of the Act was passed by an overwhelming bipartisan majority in each house after a full and vigorous debate. See 128 Cong. Rec. S4942-S4945 (daily ed. May 12, 1982); 128 Cong. Rec. H4756-H4772 (daily ed. July 28, 1982). It provides (96 Stat. 748) that men who are required to register and fail to do so "shall be ineligible for any form of assistance or benefit" under Title IV of the Higher Education Act of 1965, 20 U.S.C. (& Supp. V) 1070 *et seq.* It also provides that, in order to receive any "grant, loan or work assistance" under Title IV, a person required to register must file with the relevant institution of higher education a "statement of compliance" with the Military Selective

Service Act. Section 1113 directs the Secretary of Education, in agreement with the Director of the Selective Service System, to prescribe methods for verifying the statements of compliance, and to issue implementing regulations. Those regulations were issued in final form on April 11, 1983. 48 Fed. Reg. 15578 (to be codified at 34 C.F.R. Pt. 668). Section 1113 applies to Title IV aid for periods of instruction beginning after June 30, 1983.[1]

The legislative record shows that Congress enacted Section 1113 in order to encourage registration and to promote a fair allocation of scarce federal aid dollars by not rewarding those who failed to register. 128 Cong. Rec. H4757 (daily ed. July 28, 1982) (remarks of Rep. Whitehurst); *id.* at H4758 (remarks of Rep. Solomon); *id.* at H4769 (remarks of Rep. Montgomery); *id.* at H4770 (remarks of Rep. Stratton); 128 Cong. Rec. S4943-4944 (daily ed. May 12, 1982) (remarks of Sen. Hayakawa); *id.* at S4945 (remarks of Sen. Stennis and Sen. Jepsen). Sup-

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[1] Because of the district court's preliminary and final injunctions, the regulations did not go into effect until Justice Blackmun issued a temporary stay on June 24, 1983. However, the Secretary announced a series of grace periods, extending through September 30, 1983, during which schools were permitted to disburse Title IV aid first and obtain the required statements of registration compliance later. 48 Fed. Reg. 31175, 33695, 40380 (1983). See Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, § 1254, 97 Stat. 614, 700. This was done in order to ease the administrative burden on schools, which were able as a result to process pending aid requests in advance of securing the required statements. Beginning October 1, 1983 the schools were required to obtain statements before disbursing Title IV aid for the 1983-1984 award year. 48 Fed. Reg. 40381 (1983).

porters of Section 1113 emphasized that those who fail to register timely can still qualify for student aid by registering late. 128 Cong. Rec. H4757 (daily ed. July 28, 1982) (remarks of Rep. Whitehurst); *id.* at H4769 (remarks of Rep. Montgomery); 128 Cong. Rec. S4945 (daily ed. May 12, 1982) (remarks of Sen. Stennis). Accordingly, the statement of compliance forms in use do not require applicants to say when they registered. See 48 Fed. Reg. 15582 (1983) (to be codified at 34 C.F.R. 668.25); 128 Cong. Rec. S10544 (daily ed. July 21, 1983).

2. On November 23, 1982, the Minnesota Public Interest Research Group (MPIRG) filed a complaint seeking to enjoin the operation of Section 1113. On January 24, 1983, the district court dismissed MPIRG for lack of standing,[2] but allowed three anonymous students (John Doe, *et al.*) to intervene as plaintiffs. *MPIRG* v. *Selective Service System*, 557 F. Supp. 923 (D. Minn. 1983); *MPIRG* v. *Selective Service System*, 557 F. Supp. 925 (D. Minn. 1983).[3] The intervenors alleged that they reside in Minnesota, that they need financial aid to pursue their education, that they intend to apply for Title IV assistance, and that they are required to register with the Selective Service System but have failed to do so (J.A. 11-12). Two days later three other anonymous students (Bradley

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[2] MPIRG appealed its dismissal to the Eighth Circuit, which transferred the appeal to this Court on August 17, 1983. MPIRG's jurisdictional statement—seeking remand to the court of appeals, or in the alternative plenary review of the issue of its standing—was docketed as of September 30, 1983, No. 83-637, and is still pending.

[3] Richard Roe, one of the intervenors, has since decided not to apply for federal aid for the 1983-1984 school term (J.S. App. 32a).

Boe, *et al.*) filed a separate action making essentially the same allegations (J.A. 24-25). The two cases were informally consolidated.

On January 28, 1983, the district court denied appellees' joint motion for a temporary restraining order (J.A. 4). But on March 9, 1983, the district court granted a preliminary injunction restraining appellants from enforcing Section 1113 (J.S. App. 1a-30a). (The district court did allow appellants to promulgate regulations pending final disposition of the two lawsuits.) The court ruled that appellees had demonstrated a sufficient threat of irreparable injury because it was "inevitable" that they would "be denied financial assistance and, consequently, the opportunity to pursue their educations" (J.S. App. 5a). The district court also found it likely that appellees would succeed on the merits in showing that Section 1113 constituted a bill of attainder and violated appellees' privilege against compelled self-incrimination.

Concerning the bill of attainder issue, the court said that Section 1113 "clearly singles out an ascertainable group based on past conduct[,]" and "legislatively determines the guilt of this ascertainable group" by "assum[ing] that all students who fail to submit the required statement possess a guilty intent to avoid registration requirements" (J.S. App. 12a). The court identified the affected group as "non-registered students—* * * a group viewed by some as disloyal" (*id.* at 14a). It reasoned that their guilt was "legislatively determine[d]" because all who fail to submit a statement of compliance are automatically denied financial aid (*id.* at 12a). The court also viewed the denial of aid as punishment, because it "deprives students of the practical means

to achieve the education necessary to pursue many vocations in our society" (*id.* at 14a). The district court detected a "punitive intent" in the legislative record (*id.* at 18a), and rejected the government's argument that such an intent was nullified by the fact that nonregistrants could qualify for aid by simply registering late.

Concerning the self-incrimination issue, the district court found that the statement of compliance required by Section 1113 seeks information that "is clearly incriminating to nonregistrants and could also furnish a link in the chain of evidence used to prosecute the nonregistrant" (J.S. App. 23a). The court believed that appellees were compelled to provide this information because they had "no option of receiving federal financial assistance in another way" (*id.* at 27a). In order to complete their education, the court stated, students are "forced" by Section 1113 "to participate in an administrative process, perhaps even a hearing, where they are asked to assist the government in its investigation of their registration status" (*id.* at 28a). In the court's view, the "denial of education assistance is a sanction that makes assertion of the [Fifth Amendment] privilege costly, thereby compelling self-incrimination" (*ibid.*).

After the district court issued its preliminary injunction, the parties in both cases filed cross-motions for summary judgment and supplemental briefs, which the court took under advisement. On June 16, 1983, the court issued a memorandum order and permanent injunction (J.S. App. 31a-37a) based largely on its opinion of March 9, 1983. The permanent injunction was nationwide in scope (*id.* at 35a, 36a), despite the fact that neither action had

been certified as a class action and all the individual plaintiffs were residents of Minnesota (J.S. App. 2a).

On June 29, 1983, this Court stayed the district court's June 16 order pending the timely docketing and final disposition of this appeal.

SUMMARY OF ARGUMENT

I.A. Section 1113 has none of the attributes of a bill of attainder. Bills of attainder legislatively punish specific individuals or groups without provision for a judicial trial. Section 1113, which denies federal education aid to students who fail to register for the draft, is not directed against any specific individual or group. It neither names particular people, nor refers to past conduct in which only readily ascertainable persons have engaged and which they are powerless to change. Rather, like a variety of federal benefit provisions, it regulates present and future conduct. It grants federal aid to students who comply with the draft registration requirement, and withholds aid from those who do not.

The distinction between punishing past conduct and regulating future conduct can be seen by comparing *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1867), with *American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950). In *Cummings* the Court found that the Bill of Attainder Clause applied to a state law forbidding people who had affiliated with the Confederacy from practicing certain professions. That law, the Court held, created a bogus qualification intended "to reach the person, not the calling." 71 U.S. (4 Wall.) at 320. *Douds*, by contrast, upheld Section 9(h) of the National Labor Relations Act, which denied certain benefits to unions whose officers failed to file affidavits disclaiming membership in the Communist Party. The "decisive distinction" between that section and the law in

Cummings was that under Section 9(h) "[p]ast conduct * * * is not a bar to" signing the affidavit and getting the benefits of the Act (339 U.S. at 413, 414).

B. Not only does Section 1113 not apply to specific individuals or groups, it also does not inflict punishment. Because anyone can avoid the disqualification imposed by the law simply by registering now or in the future, Section 1113 differs from punishment in the same way that civil contempt differs from criminal contempt. If anything, Section 1113 is even less punitive than civil contempt, since the inducement it prescribes is not prison or a fine, but "the mere denial of a noncontractual governmental benefit." *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960).

Section 1113 is regulatory (rather than punitive) in purpose as well as effect. Congress's purpose in passing the law was to encourage registration by those who are required to register with the Selective Service System, but who have failed to do so out of inadvertence, neglect, or willful refusal. Granting Title IV assistance only to those who register is a natural way of accomplishing that goal, since the class of those seeking such aid overlaps to a very large extent with the class of those required to register. Such a distribution of education aid also promotes a fair allocation of increasingly scarce federal monies, since it rewards students who have performed the legal duty imposed on them by the Military Selective Service Act.

The legislative record of Section 1113 supports these purposes. Congress was plainly aware that the majority of those whom the bill would affect had "unintentionally failed to register." 128 Cong. Rec. H4757 (daily ed. July 28, 1982) (remarks of Rep. Solomon). It is unlikely that Congress wished to inflict harm on

a group that it knew consisted largely of innocent nonregistrants. Instead, the bill was designed to encourage such people to register in the future. As Senator Stennis said, one who "might have overlooked signing up * * * is not going to be penalized for that because he still has complete control of the situation. All he will have to do is just to comply with the law, and that will automatically make him eligible" (128 Cong. Rec. S4945 (daily ed. May 12, 1982)).

C. One of the principal concerns of the Bill of Attainder Clause is that the legislature, rather than the courts, should not impose punishment on specific individuals. We have said that Section 1113 does not apply to specific individuals, and is not punitive. But neither does it dispense with judicial process in any case where it is appropriate. A hearing is provided in case of any dispute between the Secretary and an applicant about whether the applicant has registered. 96 Stat. 748 (subsection (f)(4)). And the decision made at that hearing is subject to judicial review.

Section 1113 does not rely on judicial procedures to distinguish innocent from willful nonregistrants, and Congress is concededly incapable of distinguishing between those groups through the legislative process. But the very purpose of Section 1113 makes any distinction unnecessary, since the law is not designed to punish the guilty, but to encourage *all* nonregistrants to register.

II. Appellees' argument that Section 1113 compels them to incriminate themselves by requiring them to submit statements of registration compliance is a makeweight that must fall with their bill of attainder argument. First, appellees must supply registration information only if they apply for education aid. If they do not wish to supply this information, they simply need not apply. Second, if the Court agrees with us that Section 1113 is not a bill of attainder,

and that Congress may legitimately declare nonregistrants ineligible for Title IV aid, appellees are under no "compulsion" of any kind to file statements of registration compliance, because they are ineligible for aid.

ARGUMENT

I. SECTION 1113 IS NOT A BILL OF ATTAINDER

Section 1113 is not a bill of attainder forbidden by Article I, Section 9, Clause 3 of the Constitution. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 468 (1977). Section 1113 does not satisfy any of these three requirements—specificity in identification, punishment, or lack of a judicial trial. See *United States* v. *O'Brien*, 391 U.S. 367, 383 n.30 (1968).

A. Section 1113 Does Not Adversely Affect A Specific And Identifiable Individual Or Group

1. By banning bills of attainder the framers sought to prohibit the infamous English and colonial practice of legislatively punishing "specifically designated persons or groups." *United States* v. *Brown*, 381 U.S. 437, 447 (1965).[4] Historically, most bills of attainder named the parties to whom they were to apply (*id.* at 441-442). A legislative act may, however, be an attainder even if the individual is

[4] At common law "bills of attainder" imposed the death sentence; legislative acts imposing lesser sanctions were known as "bills of pains and penalties." The Constitution proscribes bills of attainder and bills of pains and penalties alike. *United States* v. *Brown*, 381 U.S. at 447.

not called by name, if the act describes "conduct which, because it is past conduct, operates only as a designation of particular persons." *Communist Party* v. *SACB*, 367 U.S. 1, 86 (1961). Thus a nameless target may be described by "a semantically equivalent phrase" (*United States* v. *Brown*, 381 U.S. at 455) which is "merely a point of reference for the ascertainment of particular persons ineluctably designated by the legislature" who have engaged in "past and ineradicable actions" (*Communist Party* v. *SACB*, 367 U.S. at 87).

Section 1113 does not name any specific individuals or groups. Neither does it describe any individuals or groups by reference to their "past and ineradicable" conduct. It creates an open, not a closed, class. It permits the award of educational benefits to a statutorily defined group of persons who have taken or will take the steps (registration for the draft) necessary to comply with its conditions. Conversely, the class denied benefits is defined not by past action but on the basis of present and future choice. Congress could not possibly have intended to punish any *particular* persons by enacting such a law, because it left everyone free to escape the disqualification the law imposes.

In this respect Section 1113 is like many other federal benefit provisions. A good example is the Veterans' Benefits Act, 38 U.S.C. (& Supp. V) 1501 *et seq.* That Act grants educational benefits to persons who choose to serve in the armed forces. 38 U.S.C. (& Supp. V) 1651, 1661. It withholds those benefits from persons who do not choose to serve. See also 42 U.S.C. (Supp. V) 254*l* (National Health Service Corps Scholarship Program). Under both Section 1113 and the Veterans' Benefits Act, whether one collects or forfeits benefits turns not on past

conduct but on a continuing option to comply with statutory conditions (registration or service). It would be sophistry to argue that in passing the Veterans' Benefits Act Congress intended to punish individuals who choose not to serve in the armed forces. For precisely the same reason it is a mistake to suggest that Section 1113 is a bill of attainder.[5]

2. The district court seemed to view the denial of assistance to nonregistrants, and the right of any nonregistrant to qualify for aid by simply registering, as somehow separable portions of the statute. In the court's opinion, "[t]o say that plaintiffs can escape the section's prohibitions by simply registering is to say that an allegedly unconstitutional law becomes valid by its mere enforcement" (J.S. App. 12a). That argument, the court opined (*id.* at 11a), was "soundly rejected" in *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1867).

But Section 1113 is quite unlike the bill of attainder in *Cummings* v. *Missouri*. That law prohibited persons from practicing certain professions unless they took an oath swearing that they had no connection with the Confederacy during the Civil War. Although the law did not name the individuals or groups to whom it applied, the Court held that by inflicting punishment for the "past act" of affiliation with the Confederacy the law created a bogus qualification intended "to reach the person, not the

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[5] The fact that military service is presently optional, while registration is a legal duty, does not lessen Congress's authority to provide incentives for registration. Congress could, after all, have provided simply that every registrant shall receive $100 when he registers (and, of course, that those who do not register shall not receive $100). The means it has chosen here is essentially no different.

calling." 71 U.S. (4 Wall.) at 319, 320. The Court added that the "expurgatory oath" provided "no escape" for those the amendment was designed to reach, since their past affiliation with the Confederacy prevented them from taking the oath without committing perjury. *Id.* at 327. As to those persons "the deprivation was intended to be, and is, absolute and perpetual" (*ibid.*).

Section 1113, by contrast, provides that an individual "*shall be* ineligible" for Title IV aid if he "*fails*" to register as required (96 Stat. 748) (emphasis added). "[C]onsistent with the statutory intent to encourage registration" (see pages 5-6, *supra*), the Secretary has issued regulations permitting "any nonregistrant who was required to register but did not * * * [to] qualify for aid * * * if he registers with Selective Service and complies with the statement and verification requirements" during the payment period for which he seeks aid. 48 Fed. Reg. 15580, 15583 (1983) (to be codified at 34 C.F.R. 668.27(b)). Ineligibility for Title IV aid is thus "made to turn upon continuingly contemporaneous fact; [it] arise[s] only because, and endure[s] only so long as, an [individual] presently [engages in conduct] of a described character." *Communist Party* v. *SACB*, 367 U.S. at 87.

The distinction between a bill of attainder (which applies only to past conduct) and a permissible statute such as Section 1113 (which regulates present and future conduct) is well illustrated in *American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950). In *Douds* the Court rejected a bill of attainder challenge to Section 9(h) of the National Labor Relations Act, which denied certain benefits to unions whose officers failed to file affidavits disclaiming member-

ship in the Communist Party. The Court noted that under Section 9(h) "[p]ast conduct * * * is not a bar to" signing the affidavit and obtaining the benefits of the Act (339 U.S. at 414). "[T]here is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit" (*ibid.*). That, the Court found, was the "decisive distinction" (*id.* at 413) from cases like *Cummings*, where "the basis of disqualification was past action or loyalty," and "nothing that those persons proscribed by its terms could ever do would change the result" (*id.* at 414). Cf. *United States* v. *Brown*, 381 U.S. at 458 ("Section 504, unlike § 9(h), disqualifies from the holding of union office not only present members of the Communist Party, but also anyone who has within the past five years been a member of the Party.").[6]

3. Even if the Bill of Attainder Clause does not apply to a law whose operation is strictly prospective, the district court held, Section 1113 does not fit that description because it irrevocably disqualifies students who have already failed to register within 30 days of their 18th birthday (J.S. App. 12a; J.S. App. 33a-34a). That is so, the court said, because Section 1113 requires registration "in accordance with any proclamation issued under [Sec-

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[6] Whatever doubt may have been cast by *Brown* upon the validity of the holding in *Douds*, it is clear that this case presents none of the same difficulties. The "alteration of * * * loyalties" required by Section 9(h) of the NLRA entailed the abandonment of conduct that was arguably constitutionally protected. See *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966); *Noto* v. *United States*, 367 U.S. 290 (1961). In this case, by contrast, the action required by Section 1113 is nothing more than performance of the legal duty to register.

tion 3 of the Military Selective Service Act]," and Proclamation No. 4771 requires those born after January 1, 1963 to register within 30 days of their 18th birthday (J.S. App. 33a). The court recognized that the Secretary's regulations permit late registrants to receive aid, but said that in that regard they contradicted the plain meaning of the statute, and so were void (*id.* at 34a).

It is of course possible to interpret Section 1113 as requiring registration *within the time* fixed by Proclamation No. 4771. But it is also possible to read its language ("in accordance with") as requiring, simply, registration *in the manner* required by any proclamation or regulation.[7] See Proclamation No. 4771, 45 Fed. Reg. 45248 (1980) ("Persons who are required to be registered shall comply with the registration procedures and other rules and regulations prescribed by the Director of Selective Service."); 32 C.F.R. Pt. 1615 ("Administration of Registration"). This interpretation is supported by the language of subsection (f)(4), which states that the Secretary shall issue regulations providing

> that any person to whom the Secretary of Education proposes to deny assistance * * * for failure to [register] * * * shall be given * * * not less than thirty days * * * to * * * establish[] that he has complied with the registration requirements * * *.

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[7] This is not to say that those subject to the Military Selective Service Act are free for all purposes to register whenever they please. Although failure to register within the time fixed by Proclamation No. 4771 does not disqualify the registrant for Title IV aid, it is a criminal offense punishable under 50 U.S.C. App. (& Supp. V) 462. As we advised the district court, however, no registrant has ever been prosecuted for late registration.

This provision plainly gives nonregistrants 30 days, after learning of their ineligibility for Title IV aid, within which to register and qualify. The Secretary has so interpreted it. See 48 Fed. Reg. 15583 (1983) (to be codified at 34 C.F.R. 668.27(b)(1)). See also 48 Fed. Reg. 15580 (1983).

Any other construction of Section 1113 would be perverse. The primary purpose of that section is to encourage registration by those who must register, but have not. To interpret it as unconditionally denying aid to those persons would make it impossible to accomplish that objective. Since this Court's "task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations" (*CSC* v. *Letter Carriers*, 413 U.S. 548, 571 (1973)), a proper respect for the work of Congress compels rejection of the district court's reading.

B. Section 1113 Does Not Inflict Punishment

Section 1113 does not inflict punishment within the meaning of the Bill of Attainder Clause. As this Court emphasized in *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960), "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." "The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed." *United States* v. *Lovett*, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring). In order to decide whether a statute imposes punishment, thereby bringing it within the reach of the Bill of Attainder Clause, a court must determine whether: (1) any feature of the chal-

lenged statute falls within the historical meaning of legislative punishment, (2) "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes[,]" and (3) "whether the legislative record evinces a congressional intent to punish." *Nixon* v. *Administrator of General Services*, 433 U.S. at 473, 475-476, 478.

1.a. Section 1113 does not inflict any sanctions that fall within the historical meaning of legislative punishment. Indeed, it is doubtful that Section 1113 can properly be considered "punishment" in any sense of the term, since there is no one (otherwise eligible) who cannot get Title IV benefits simply by registering.[8] Section 1113 thus differs from "punishment" in the same way that civil contempt differs from criminal contempt. This Court held in *Shillitani* v. *United States*, 384 U.S. 364, 368-370 (1966), that

> [w]hen [those affected] carry "the keys of their prison in their own pockets," * * * the action "is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees."
>
> * * * * * *
>
> [In this case the] sentences were clearly intended to operate in a prospective manner—to coerce, rather than punish. As such, they relate to civil contempt.

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[8] We note that Section 12(d) of the Military Selective Service Act, 50 U.S.C. App. 462(d), makes the duty to register a continuing obligation. See S. Rep. 92-93, 92d Cong., 1st Sess. 22 (1971).

Here, too the "discomforting action" threatened by the government (*United States* v. *Lovett*, 328 U.S. at 324 (Frankfurter, J., concurring)) is always contingent on the individual's future conduct.[9] Prospective operation is the hallmark of regulation, not punishment. For it is the essence of punishment that it falls on "past acts"—"[p]unishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted" (*ibid.*).[10]

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[9] We do not suggest that the parallel between Section 1113 and civil contempt is exact, though what differences there are suggest that Section 1113 is—if anything—*less* punitive. Unlike civil contempt, for example, which is directed at a specific individual, Section 1113 applies to a class whose membership is uncertain and constantly changing. Moreover, the nature of the inducement in Section 1113 (as we point out below) is entirely different from imprisonment or a fine, used to enforce civil contempt. Still a third difference is that civil contempt involves a judicial determination about what kind of behavior warrants remedial action, whereas Congress itself decided in Section 1113 that nonregistration would be a basis for withholding Title IV aid. The explanation for that difference, however, lies in Congress's constitutional authority to act by legislating general rules.

[10] This Court stated in *United States* v. *Brown*, 381 U.S. at 457 n.32 (emphasis added), that "inescapability [may not be] an *absolute* prerequisite to a finding of attainder." *Brown* itself is not proof of that proposition, since the statute there ineluctably punished past membership in the Communist Party. 381 U.S. at 438-439 n.1, 458. Still, there may be cases where a bill of attainder is found even though the affected individual is given one last chance of avoidance. See the examples cited in 381 U.S. at 457 n.32. By the same token, there are some cases where the classification as civil rather than criminal contempt admits of some doubt—*e.g.*, those where the court imposes a suspended sentence of imprisonment conditioned on future behavior. But see O. Fiss, *Injunctions* 760-

The nature of the "discomforting action" in this case also undermines appellees' claim that Section 1113 inflicts punishment. The consequence of failure to register is ineligibility for Title IV assistance. But the withholding of such a benefit is not comparable to the sanctions—such as death, imprisonment, banishment, and uncompensated confiscation of property—historically associated with bills of attainder. See *Nixon* v. *Administrator of General Services*, 433 U.S. at 473-475. Here, as with the denial of social security benefits to deportees in *Flemming* v. *Nestor*, 363 U.S. at 617, "the sanction is the mere denial of a noncontractual governmental benefit. No affirmative disability or restraint is imposed, and certainly nothing approaching the 'infamous punishment' of imprisonment * * *." [11]

b. The district court conceded that the denial of aid under Section 1113 "is not a historical punishment" (J.S. App. 14a). The court nevertheless held

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766 (1971). This case would resemble that situation (and the examples given in *Brown*) more closely if Congress had absolutely disqualified all who failed to register within a certain time—such as six months—rather than leaving open perpetually the possibility of qualifying for aid. In any event the existence of more difficult cases does not undercut the point made in text—that a focus on future rather than past conduct distinguishes regulation from punishment.

[11] Indeed, it might justly be said that appellees have less cause to complain of the deprivation here than Nestor did of the loss of social security benefits. The latter—unlike Title IV aid—"are products of a contributory system, the funds being raised by payment from employees and employers alike * * * [;] and only those who contribute to the fund are entitled to its benefits, the amount of benefits being related to the amount of contributions made." 363 U.S. at 631 (Douglas, J., dissenting).

that the denial of Title IV assistance was "punishment" because it "deprives students of the practical means to achieve the education necessary to pursue many vocations in our society" (*ibid.*). And restrictions on the right to pursue a particular vocation, the court continued, were held in *Cummings* v. *Missouri* to be punishment forbidden by the Bill of Attainder Clause (*ibid.*).

But "the logical limitations on [the district court's] nexus theory are difficult to perceive." *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 37 (1973). It might with equal justice be argued that denial of social security benefits to Nestor deprived him of the wherewithal to secure medical treatment or meet mortgage payments, and so resulted in the infliction of physical harm or the loss of his home—deprivations that also would amount to punishment in the sense intended by the Bill of Attainder Clause. That approach, however, deprives of any meaning the first question posed by this Court in *Nixon* v. *Administrator of General Services* (433 U.S. at 475): whether any "feature of the challenged Act falls within the historical meaning of legislative punishment."

2.a. Section 1113 also does not impose punishment because it is obviously designed "to further nonpunitive legislative purposes." *Nixon* v. *Administrator of General Services*, 433 U.S. at 475-476. Above all, Congress stressed that the law would encourage those required to register with the Selective Service System to do so. See pages 26-27, *infra*. Conditioning Title IV assistance on registration is a natural means to that end. The Military Selective Service Act (50 U.S.C. App. (Supp. V) 453) provides for the registration of males between the ages of 18 and 26. That group is part of the very class to which Title IV assistance is offered. Such aid is available not just at

colleges and universities, but also at numerous kinds of business, trade, technical, and vocational schools. See 20 U.S.C. 1085(b), (c), 1088. Of the high school class graduating in 1980, nearly 60% of the male graduates enrolled in some form of post-secondary education before March 1982. Department of Education, National Center for Education Statistics, *High School and Beyond* 12-13 (unpublished draft 1984). Thus the class of individuals seeking student aid overlaps to a great extent the class of those required to register.

> Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce * * * private parties to cooperate voluntarily with federal policy.

Fullilove v. *Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.).

Section 1113 also promotes a fair allocation of increasingly scarce federal aid dollars by rewarding with Title IV assistance only those students who have performed the legal duty imposed on them by the Military Selective Service Act. See 128 Cong. Rec. S4944 (daily ed. May 12, 1982) (remarks of Sen. Hayakawa).[12] Finally, Section 1113 directly assists the Selective Service System in its enforcement of the

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[12] This "fairness" justification will be more persuasive still in the event a draft should become necessary. For in that case giving aid to nonregistrants who are subject to the draft will amount to financing an activity (attending school) in which they are not legally entitled to engage (since they should be performing military service).

registration requirement of the Military Selective Service Act. The government cannot rely solely on criminal prosecution to enforce registration, any more than it can rely on criminal prosecution to enforce other federal laws. It is legitimate for Congress to devise alternative legislative means, such as Section 1113, to promote maximum compliance with the registration requirement in order to meet the important national defense goals that underlie it. See *Rostker* v. *Goldberg*, 453 U.S. 57, 64-69 (1981).

b. The district court concluded that Section 1113 failed "[t]he second element of the *Nixon* three-part test" (J.S. App. 15a), because (*id.* at 16a):

> It * * * assumes nonregistrants possess guilty intent, promotes the aims of retribution and deterrence, applies to behavior that is already a crime, and is excessively broad in relation to its alternative purposes.

In saying that Section 1113 "assumes nonregistrants possess guilty intent," the district court apparently meant to suggest that by focusing on state of mind Congress indicated a primary concern with something other than "nonpunitive legislative purposes." *Nixon* v. *Administrator of General Services*, 433 U.S. at 475-476. The difficulty with this conclusion is that the sponsor of the bill himself said it would apply for the most part to innocent nonregistrants (128 Cong. Rec. H4757 (daily ed. July 28, 1982) (remarks of Rep. Solomon))—a perfectly sensible application when one considers that its purpose is to offer such persons a reminder and inducement to register. It seems unlikely that Congress wished to inflict punishment on a group that it knew consists largely of people who have "unintentionally failed to register" (*ibid.*).

For the same reason there is little substance to the court's conclusion that Section 1113 "promotes the aims of retribution and deterrence, * * * and is excessively broad in relation to its alternative purposes" (J.S. App. 16a). In holding the statute overbroad, the court recognized that it "applies to those who have inadvertently failed to register as well as to those who have intentionally failed to register" (*ibid.*). That being so, one wonders why the court did not reexamine its conclusion that the statute's aim was retributive. The point is, of course, that if one understands that the statute's purpose is not to punish the guilty, but to encourage registration by innocent and guilty alike, then it follows that it is no broader than it has to be.

It is true, as the court pointed out, that Section 1113 "applies to behavior that is already a crime" (*ibid.*). But because "Congress may impose both a criminal and a civil sanction in respect to the same act or omission," *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938), "that indication is not as strong as it seems at first blush." *United States* v. *Ward*, 448 U.S. 242, 250 (1980). Given Congress's clear intent to allow anyone—even willful nonregistrants—to get Title IV aid by the simple act of registering, it is hard to conclude from this fact alone that the real purpose behind Section 1113 is punitive.[13]

3.a. The legislative record supports the nonpunitive purposes just discussed. The debates on Section

[13] *Ward* itself dealt with a law imposing a $5,000 penalty for conduct made criminal by another statute. The Court nevertheless concluded that that fact alone, absent other indications, was "in no way sufficient to render unconstitutional congressional classification of the penalty * * * as civil" (448 U.S. at 250-251).

1113 clearly show Congress's conviction that most of those who would be affected by the law had failed to register for entirely innocent reasons. Representative Solomon, the House sponsor of the bill, introduced it by saying that "[t]here are some 700,000 young men in this country who have, for the most part, *unintentionally* failed to register" (128 Cong. Rec. H4757 (daily ed. July 28, 1982) (emphasis added)). See also *ibid.* (remarks of Rep. Solomon) ("who have either intentionally or unintentionally chosen not to register"); *id.* at H4759 (remarks of Rep. Simon) ("a lot of them probably do not even know about it"); 128 Cong. Rec. S4945 (daily ed. May 12, 1982) (remarks of Sen. Stennis); *ibid.* (remarks of Sen. Durenberger) ("In many cases, this is due to a simple lack of understanding or awareness.").

Consistent with that conviction, Congress made equally evident its intent that the law should give innocent and willful nonregistrants alike the right to benefits whenever they registered. Senator Stennis made the point most forcefully (*ibid.*):

> I thought of the proposition here where some youngster might have overlooked signing up or might have misunderstood it or had not been correctly informed, but he is not going to be penalized for that because he still has complete control of the situation. All he will have to do is just to comply with the law, and that will automatically make him eligible so far as this prohibition or restriction is concerned.

See also 128 Cong. Rec. H4769 (daily ed. July 28, 1982) (remarks of Rep. Montgomery) ("they are not eligible until they register and * * * if they do register then they would be eligible for these funds").

Taken together, these facets of the law undermine any claim that its objective is punitive. Its purpose, instead, is to encourage registration. As Sen-

ator Jepsen, one of the Senate sponsors, stated (128 Cong. Rec. S4945 (daily ed. May 12, 1982)):

> I also point out that the chief purpose of the amendment is to encourage greater compliance with the registration requirement. Registration is the law of the land. And this amendment is not meant to punish as many nonregistrants as possible.

See also 128 Cong. Rec. H4757 (daily ed. July 28, 1982) (remarks of Rep. Whitehurst); *id.* at H4758 (remarks of Rep. Solomon) ("I just think this is going to be an additional encouragement"); *id.* at H4770 (remarks of Rep. Stratton) "It is a method * * * to encourage young people * * * to comply with the law").

Still another purpose of Section 1113, as the debates reveal, is to promote a fair allocation of federal aid dollars by rewarding those students who have performed the legal duty imposed on them by the Military Selective Service Act—much as Congress has chosen to reward those who enlist in the armed forces by the provision of veterans' benefits. See also *Regan* v. *Taxation with Representation*, No. 81-2338 (May 23, 1983). As Senator Hayakawa stated (128 Cong. Rec. S4943-S4944 (daily ed. May 12, 1982)):

> This amendment seeks not only to increase compliance with the registration requirement but also to insure the most fair and just usage of Federal education benefits. During these times of extreme budgetary constraints, times when even the most worthwhile programs are cut back drastically, this Government has every obligation to see that Federal dollars are spent in the most fair and prudent manner possible.

b. The district court cited several passages from the debate on the bill in which members of Congress

expressed their displeasure with those young men who had willfully refused to register (J.S. App. 17a-18a). It would of course be surprising if discussion of a measure designed to encourage future compliance with the law by a group that includes at least some self-proclaimed law-breakers did not evoke sentiments of that kind. But the issue is not whether Congress was indignant about past acts of defiance, but whether it intended—in Section 1113—to punish those past acts. As the debates make evident, the aim of the bill is to deny Title IV aid only to those individuals—innocent and willful alike—who persist in failing to register in the *future*. And an intent to make future lawlessness (as well as future carelessness) unattractive is simply not an intent to punish within the meaning of the Bill of Attainder Clause.

C. Section 1113 Does Not Supplant The Judicial Process

A central concern of the Bill of Attainder Clause is "that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *United States* v. *Brown*, 381 U.S. at 445. The thought is that both the " 'numbers and organization' " of the legislature, and its " 'susceptib[ility] to popular clamor' " (*ibid.*, quoting 1 T. Cooley, *Constitutional Limitations* 536-537 (8th ed. 1927)), will lead to inaccurate decisions based on prejudice or blunder. But there is in this case no claim that Section 1113 inaccurately separates those who have registered from those who have not. After all, the initial classification is made by the applicant himself, who simply files a statement that he has registered. The statute

(subsection (f)(3)) and the regulations (48 Fed. Reg. 15582 (1983), to be codified at 34 C.F.R. 668.26) do provide a method for verification. But in the event of disagreement between the applicant and the Secretary, the statute provides "an opportunity for a hearing to establish * * * compliance" (subsection (f)(4); see also 48 Fed. Reg. 15583 (1983), to be codified at 34 C.F.R. 668.27). The decision made at that hearing is in turn subject to judicial review. 5 U.S.C. 704.

Section 1113 does not distinguish guilty from innocent nonregistrants, and we freely concede that Congress does not possess the power to sort out those two classes and impose punishment on the former. But Congress neither attempted nor wished to do that. It did not decide that willful nonregistrants should be punished. Its purpose was instead to provide an inducement for *all* nonregistrants to register. For that reason there is no need—indeed, it would be irrational—to distinguish among classes of nonregistrants. And because Congress, for legitimate reasons, wished to treat the two classes alike, there is simply no role for the courts to play in sorting them out.

II. SECTION 1113 DOES NOT COMPEL APPELLEES TO INCRIMINATE THEMSELVES IN VIOLATION OF THE FIFTH AMENDMENT

The district court found that Section 1113 violates appellees' Fifth Amendment privilege by denying Title IV assistance to nonregistrants who refuse, from fear of self-incrimination, to submit a statement of compliance. That denial, the court found,

penalized their exercise of the privilege (J.S. App. 28a).[14] This conclusion is specious.

The primary objective of the privilege against compelled self-incrimination is to "insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." *Counselman* v. *Hitchcock*, 142 U.S. 547, 562 (1892). The compulsion requirement "comes directly from the constitutional language directing that no person 'shall be *compelled* in any criminal case to be a witness against himself.'" *South Dakota* v. *Neville*, No. 81-1453 (Feb. 22, 1983) (emphasis in original), slip op. 9. Absent compulsion, the privilege does not attach. See *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977); *Hoffa* v. *United States*, 385 U.S. 293, 304 (1966).

Here there is no compulsion. Appellees have the option of simply not applying for federal aid, and so furnishing no information whatever to the govern-

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[14] Appellees have also asserted (Motion to Affirm 13) that Section 1113 violates the privilege in a second way: those nonregistrants who do execute a statement, but assert their privilege rather than affirm or deny registration, are forced to incriminate themselves by the very act of claiming the privilege. This suggestion is frivolous. Since an applicant may not receive Title IV aid without *affirming* that he has registered, and since nonapplicants need not execute the form, it is quite unlikely that anyone would pursue the pointless and self-destructive course of action appellees envision. In any event, appellees' point seems to be that by claiming the privilege such a benighted applicant would alert federal authorities to the fact that he had something to hide. But if that is so, it does not distinguish him from anyone else who might claim the privilege under any other circumstances. The Fifth Amendment does not protect a claimant against suspicions aroused by his silence; it only assures him that he need not condemn himself out of his own mouth.

ment. The cases relied on by the district court, on the other hand, each involved a summons, subpoena, or other form of legal compulsion to provide information to the government.[15]

There is a second, and more obvious, reason why appellees are not compelled to incriminate themselves. The district court found that Section 1113 forces them to choose between self-accusation and loss of Title IV aid, and that the threat of deprivation is sufficiently coercive to violate their Fifth Amendment privilege (J.A. App. 27a-28a). But Section 1113 states that one who has not registered is not entitled to Title IV aid at all, whether he advises the government of his failure to register or not. That is a decision which, as we made clear in our discussion of bills of attainder, Congress is authorized to make. See also *Regan* v. *Taxation with Representation, supra.* The "compulsion" envisioned by the district court is

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[15] *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977) (grand jury subpoena); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973) (grand jury subpoena); *California* v. *Byers*, 402 U.S. 424 (1971) (statutory requirement to stop and report car accident); *Leary* v. *United States*, 395 U.S. 6 (1969) (statutory requirement to pay marijuana transfer tax); *Marchetti* v. *United States*, 390 U.S. 39 (1968) (statutory requirement to register and pay wagering tax); *In re Gault*, 387 U.S. 1 (1967) (juvenile defendant); *Spevack* v. *Klein*, 385 U.S. 511 (1967) (subpoena duces tecum and order to testify at judicial inquiry); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967) (Attorney General's inquiry ordered by state supreme court); *Albertson* v. *SACB*, 382 U.S. 70 (1965) (statutory registration requirement); *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964) (subpoena to testify before Waterfront Commission); *Ullman* v. *United States*, 350 U.S. 422 (1956) (grand jury subpoena); *Quinn* v. *United States*, 349 U.S. 155 (1955) (summons to testify before congressional committee); *Hoffman* v. *United States*, 341 U.S. 479 (1951) (grand jury subpoena).

thus nonexistent, since it is inconceivable that one is compelled in any way to apply for benefits for which he is ineligible. Appellees are no more forced to choose between self-accusation and loss of Title IV aid than they are forced to choose between self-accusation and loss of veterans' benefits; they simply have no right whatever to either form of assistance. If we are correct in believing that Section 1113 is not a bill of attainder, then the district court's Fifth Amendment holding has the untoward effect of enabling appellees to raid the federal treasury for money to which they are not entitled.[16]

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[16] We doubt that Congress entertained any intention of requiring applicants for Title IV aid to provide statements that they had registered with the Selective Service System if registration is not a relevant qualification for Title IV assistance. Thus subsection (f) (2) is not severable from subsection (f) (1); and if we are mistaken in our conviction that the latter is not a bill of attainder, then the statement of compliance requirement would fall as well. The Fifth Amendment issue consequently has no independent significance.

CONCLUSION

The judgment of the district court should be reversed.[17]

Respectfully submitted.

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JANUARY 1984

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[17] Since the district court's nationwide injunction has been stayed (see note 1, *supra*), and since this Court's decision will definitively resolve the issues in this case, we need not rehearse here our objections to the scope of the injunction. See J.S. 19-21. We feel compelled nonetheless to reiterate our concern with the procedure followed by the district court in issuing that order without a class certification.

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